BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 1996-318-C - ORDER NO. 2001-632

JULY 2, 2001

IN RE: Establishment of Fund to Address Revenue Impact of Incumbent Local Exchange Carriers Electing to Reduce Switched Access Rates.	)))	ORDER DENYING PETITION FOR RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Reconsideration of Order No. 2001-396, filed by the Consumer Advocate for the State of South Carolina (the Consumer Advocate). Because of the reasoning stated below, the Petition is denied.

First, the Consumer Advocate states that this Commission's finding that we would not consider evidence for years after 1996 in making our decision on remand was inconsistent with the Supreme Court's opinion, and also inconsistent with our ruling regarding the admissibility of such evidence. The Consumer Advocate states a belief that, instead of remanding the case for re-evaluation of our prior decision, we were ordered to hold new hearings on the matter before re-evaluating the total five year rate increase. Under the Consumer Advocate's theory, the Administrative Procedures Act allows full participation of parties, and the Court did nothing to limit those rights. Accordingly, the Consumer Advocate states that this Commission should have used more recent data in order to determine future rate increases. The Consumer Advocate also points to the fact that this Commission could have approved a single rate increase in 1996, but instead chose to spread it out over five years. Thus data since 1996 should have been examined

under the Consumer Advocate's theory, especially since there is evidence in the record post-1996.

Apparently, the Consumer Advocate believes that in ordering new hearings to "re-evaluate" the previously-approved rate increases, the Supreme Court intended for the Commission to retry this case *de novo*, thereby allowing the Consumer Advocate to raise new issues and present new evidence on those issues. We do not believe that this was the Court's intent, nor is it consistent with the law of this State. The Court ordered the Commission to "hold hearings for each local exchange carrier *after adequate notice to the affected customers*, re-evaluate the total five-year increases, and adjust the future scheduled annual rate increases if necessary (emphasis added)." The Court was clearly concerned with the adequacy of the initial notice and wished to provide an opportunity to "affected customers" who may not have had notice of the first proceeding to participate in a new hearing. If the Court had intended for the Commission to allow the original parties to this proceeding to re-try this case, it would have ordered the Commission to start anew, rather than to conduct a re-evaluation.

Furthermore, the Supreme Court did not direct the acceptance of new evidence in this proceeding. In a case where the Supreme Court remanded a matter to the Public Service Commission for "further consideration," the Court held that it was improper for the Commission to consider additional evidence. See Parker v. South Carolina Public Service Commission, 342 S.E. 2d 403, 405 (S.C. 1986). The Court stated: "Unless the Court provides for the taking of additional evidence, no party may afford itself two bites at the apple. Id. Similarly, in a case where the Supreme Court remanded to the

Commission to "substantiate the record," the Court later held that such an instruction was not intended to permit the Commission to reopen the record to receive additional evidence. Piedmont Natural Gas Co., Inc. v. Hamm, 389 S.E. 2d 655 (S.C. 1990).

While it is true that the Court in this case ordered that hearings be held after adequate notice to affected customers, the use of the term "re-evaluate" indicates that the Court intended that the Commission review evidence of record in the initial proceeding, based on Supreme Court precedent. Furthermore, it is evident that the Court's concern was with affected customers who may not have had notice and therefore did not participate in the first proceeding. The hearings were intended to provide an opportunity for those parties to be heard, not to allow the Consumer Advocate a "second bite at the apple."

The Consumer Advocate next asserts that the Commission erred in finding that the interim LEC Fund is revenue neutral. He claims that Staff witness Ellison's expert opinion is of no probative value because there is no evidentiary basis for it in the record. The Consumer Advocate misunderstands and misconstrues both the Commission's finding and Ellison's testimony. We found by law that the Interim LEC Fund is required by law to be revenue neutral. The relevant statute requires that the Commission allow adjustments to rates not to exceed statewide average rates and distributions from the Interim LEC Fund "as may be necessary to recover those revenues lost through the concurrent reduction of the intrastate switched access rates." S.C. Code Ann. Section 58-9-280(L). In other words, the combination of revenues received from rate adjustments and from Interim LEC Fund withdrawals cannot exceed the amount necessary to recover

revenues lost as a result of reductions in intrastate switched access charges. It should be pointed out that Staff witness Ellison's testimony was factual in nature and did not represent an "expert opinion" on the revenue neutrality of the Interim LEC Fund, as the Consumer Advocate suggests. Ellison testified regarding the Commission Staff's audit process and the steps the Staff takes to verify that the companies comply with the revenue neutrality requirement of the statute. Even if Ellison's testimony could be construed as an expert opinion regarding the revenue neutrality of the Interim LEC Fund, Ellison himself provided enough factual evidence to support such an opinion.

Next, the Consumer Advocate alleges that this Commission erred in not requiring the companies involved to file accounting and pro forma adjustments, which he asserts are required by Commission Regulation 103-834. Again, the rate adjustments permitted in conjunction with the Interim LEC Fund do not impact earnings or rates of return. Therefore, the accounting and pro forma adjustment information required by Regulation 103-834 does not have the same relevance here that it would have in a traditional or general rate case, where the Commission must consider the impact of a company's proposed rate adjustments on its earnings and rate of return. Nevertheless, as the Commission stated, it had available to it all of the information required by Regulation 103-834. The construction of a regulation by the agency charged with its administration is entitled to great deference. See Home Health Service v. South Carolina Taz Commission, 440 S.E. 2d 375, 377 (S.C. 1994).

Also, the Consumer Advocate argued in his opening statement that the Commission should have considered increasing rates other than those for basic local

exchange services. We noted in our Order No. 2001-396 that the Consumer Advocate did not present any evidence on this issue in the first proceeding, did not raise it on appeal to the Supreme Court, and did not raise it in the testimony of its witness on remand. See Order No. 2001-396 at 12-13. The Consumer Advocate responds by stating that his failure to raise the issue in the current proceeding was due to the Commission's "denial of a discovery conference or compelling the companies to respond to the Consumer Advocate's interrogatories." Consumer Advocate's Petition for Reconsideration at 4.

First, it should be noted that the Consumer Advocate's motion was for a discovery conference and for continuance of the scheduled hearing on remand in this matter. The Consumer Advocate did not ask the Commission to compel any responses to interrogatories in this matter. Unfortunately, the Consumer Advocate waited to request a discovery conference until it would have been necessary for the Commission to continue the scheduled hearing in order to hold the requested discovery conference. The Consumer Advocate had been aware for almost a full year that the matter was remanded and would be coming up before the Commission. The Supreme Court issued its order remanding the matter on January 24, 2000. Nonetheless, the Consumer Advocate waited until January 11, 2001 to serve interrogatories on any of the companies involved (the first hearing was already scheduled for February 16, 2001), and until January 31, 2001 to file his motion requesting a discovery conference. This he cannot do.

In any event, even if the Consumer Advocate's delay could be justified, the Commission specifically found that ALLTEL had provided all information relevant to the subject matter involved in this action that was requested by the Consumer Advocate, with

the exception of ALLTEL's rate of return, which this Commission ordered ALLTEL to file. (ALLTEL was the first of the scheduled hearings on remand. Subsequently, the proceedings were consolidated at the Consumer Advocate's request.) As noted by our Order No. 2001-151 Denying Discovery Conference and Continuance, ALLTEL had provided to the Consumer Advocate four years of detailed annual reports, 38 pages of tariff sheets, a detailed embedded cost study, information on interstate high cost funds received over a four year period, and 165 pages of agreements between ALLTEL and other carriers. The Consumer Advocate simply did not leave himself enough time to conduct discovery or review the extensive material provided to him in time for the scheduled hearing. (We would note that the detailed embedded cost study was offered to the Consumer Advocate upon execution of a Protective Agreement, which was apparently provided to the Consumer Advocate, but never returned.) In any event, this ground of the Consumer Advocate's Petition is also rejected.

Finally, the Consumer Advocate asserts that there was no convincing evidence presented that basic local exchange rates are priced below cost. As the Commission held, the relevant statute here is clear, and it requires that the Commission allow adjustments to participating LECs' rates (other than intrastate switched access rates), as long as they do not exceed statewide average rates. Order No. 2001-396 at 13. The statute does not contain any requirement that rates be priced below cost before they can be adjusted and, therefore, such a finding was not necessary to the Commission's decision in this matter. Nevertheless, this Commission stated as an additional ground that the testimony on this point was convincing. There is probative evidence in the record, in both Dr. Beauvais'

and Mr. Walsh's testimony to support this assertion. (See citations in Order No. 2001-396 at 13.)

For the reasons stated above, the Petition of the Consumer Advocate is denied.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)